

RECEIVED

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN - 5 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Facilitate
Future Development of SMR Systems
in the 800 MHz Frequency Band

DOCKET FILE COPY ORIGINAL

ORIGINAL

PR Docket No. 93-144
RM-8117, RM-8030
RM-8029

and

Implementation of Section 309(j)
of the Communications Act-Competitive
Bidding 800 Mhz SMR

PP Docket No. 93-253

To: The Commission

Comments Of
DCL ASSOCIATES, INC.

I. Standing To File Comments

DCL Associates, Inc. ("DCL") is a management consulting firm engaged in the management of cellular and specialized mobile radio properties. DCL has constructed and managed numerous cellular systems and currently manages the Benton Harbor non-wireline cellular system which grosses approximately \$6 million in annual revenues. (In fact, the Benton Harbor non-wireline cellular system is one of the very few cellular systems still owned and operated by its original owners who received their FCC license in 1989.) In the SMR industry, DCL currently manages approximately 1,700 YX SMR channels, spanning 64 cities and with the ability to service a population of over 11 million with advanced wireless communications services. DCL and its small business clients, (consisting of women, hispanics and entrepreneurs) were granted extended implementation authority by the Federal Communications Commission in order to construct a complex wide area SMR communications system.

No. of Copies rec'd
List ABCDE

049

DCL has assisted in procuring over ten million dollars to construct and operate cellular systems and is in the process of securing funding and strategic partners to assist in the deployment of its wide area SMR network. DCL intends to participate in the SMR license auction process in order to augment its existing SMR wide-area footprint. Pursuant to the above, DCL and its clients have an active and vested interest in the outcome of PR Docket 93-144.

II. Any Reduction And/Or Elimination Of Extended Implementation Periods Previously Granted Will Reduce SMR Auction Revenues

Any retroactive reduction or elimination of extended implementation periods previously granted would so shake the SMR industry's confidence in the Commission that SMR industry participants will be extremely wary of paying for SMR licenses which could later be retroactively altered in whatever manner the Commission believed would further increase funds to the Federal Treasury.

Retroactive policy changes frighten and concern wireless communications companies because such changes convey the clear message that the Commission may not stand by its policies and rules. The proven inability to rely on the Commission's representations will undoubtedly deter SMR industry participants from bidding aggressively for SMR licenses, which the Commission may later alter, modify, or, in various ways, diminish in functionality, usefulness or value.

In light of the retroactive freeze placed on pending SMR applications, the Commission has already sewn seeds of distrust and caution among SMR industry participants (i.e. those to whom it wishes to sell its SMR spectrum). If the Commission were to "step up" its retroactive damages to the SMR industry by reducing or eliminating extended implementation periods previously granted to SMR licensees (and, thus, affect the business plans and capital investments of many existing licensees), then it will send the entire SMR industry a clear and distinct message - "When you purchase

SMR spectrum, you don't really know what you're getting. Retroactive policy changes may alter the value and functionality of any existing license at any time. Buyer beware!" Many SMR industry participants will elect not to participate in SMR auctions should further retroactive and damaging changes be implemented by the Commission. Some would-be PCS auction bidders (e.g. MCI) have already elected to forego spectrum auctions. Those remaining few SMR participants who do bid in the auctions, assuming any damaging change to existing extended implementation periods, will do so with trepidation and caution given the knowledge that retroactive licensing adjustments occur in the SMR industry.

The integrity of the Federal Communications Commission is, more than at any time in its history, of paramount importance as it attempts to raise billions of dollars by selling "spectrum licenses and rights" to American business. American business must be reassured that what it is to pay billions of dollars for will not be retroactively altered or changed at some future point in time and that the Commission does, indeed, stand by its grants, policies and actions.

III. Extended Implementation Authorizations Pose No Danger Of Spectrum Warehousing

Because those in receipt of extended implementation authority must adhere to strict construction benchmarks and deadlines, extended implementations do not enable recipients to warehouse spectrum. Should construction benchmarks, report filing deadlines, etc., not be met by any recipient of extended implementation authority, then the applicable SMR channels would be subject to the recovery provisions outlined in Rule 90.629(c). Those businesses in receipt of extended implementation authority have, or are developing, viable business plans to implement advanced wireless communications services to the public and do not fall into the category of speculators, or spectrum warehouseers.

IV. Honoring Extended Implementation Authorizations Will Benefit The American Consumer

Because extended implementation periods will expire before the proposed five year implementation periods to be granted to future wide-area SMR auction winners, extended implementation recipients will initiate advanced wireless communications services to consumers well in advance of wide-area SMR auction winners. Thus, consumers will receive advanced wireless communications services on the 800 Mhz band at an earlier date from extended implementation recipients than from SMR auction winners. Given the Commission's objective of expediting the provision of advanced communications services to the public, extended implementation periods further that objective. In the unlikely event that a recipient of extended implementation fails to meet its construction benchmarks, it will then forfeit its SMR channels to a wide-area SMR auction winner who would still possess ample time to construct and utilize the recovered channels.

V. Any Reduction Or Elimination Of Extended Implementation Periods Previously Granted Would Cause Irreparable Economic Damage To Recipients And Impede SMR Industry Progress

Those businesses who have received extended implementation periods have committed time, personnel and capital to develop and begin to implement business plans which could not be implemented without such extended implementations. Any reduction or retraction of extended implementation periods would cause substantial economic damage to recipients and further slow the development of advanced wireless services on the 800 Mhz band.

Additionally, the same justification which exists to provide wide-area SMR auction winners with extended implementation periods exists for current recipients of extended implementation authority. That is, businesses which own or manage thousands of SMR channels cannot develop them in an efficient, cohesive and operationally sensible manner without extended implementation authority. Without

extended implementation authority, the ESMR industry could not have been conceived and developed and the "SMR auction opportunity" would not have appeared. Though the industry is about to enter the era of auctions, previously granted extended implementation periods must be honored in order to: treat industry participants fairly; prevent economic damage to those who have relied on such extensions; and, avoid slowing the progress of advanced service provision on the 800 Mhz band.

VI. Extended Implementation Authority Recipients Should Be Granted New Five Year Construction Schedules in Wide-Areas Where They Win Auctions

The successful auction purchase of a wide-area SMR license will require an extended implementation authority recipient to reformulate its business plan within a given wide-area in order to construct its newly acquired and previously owned channels in a cohesive and operationally efficient manner, thus necessitating the Commission's placement of all such channels on a new five year construction schedule. Also, the placing of extended implementation channels on the same construction schedule as newly purchased wide-area channels (within a given area) would encourage extended implementation recipients to bid in wide-area auctions, thus increasing auction revenues.

VII. The Preservation Of Extended Implementation Authorizations Will Increase Participation Of Women, Minorities And Small Businesses In SMR

DCL's clients are women, minorities and small businesses: the precise types of designated entities that the Commission has worked so hard to include in its spectrum auctions by establishing various special considerations for such entities. Any reduction and/or elimination of extended implementation periods would destroy the business plan and capital investment of DCL and its clients and prevent the participation of a strong group of designated entities from the evolving SMR industry. Aside from DCL's clients, DCL believes that women, minorities and small businesses are included in various other granted, and applied for, extended implementation authorities. Thus, to maximize participation of designated entities in the SMR industry, the Commission must ensure

that it honors existing extended implementation authorities.

VIII. SMR Stations Should Be Permitted Anywhere Within A Defined Protected Service Area On All 280 Commercial 800 Mhz Channels

By permitting incumbent SMR licensees to construct new base stations anywhere within the radius of their originally authorized stations on all 280 SMR channels, provided that the 40 dBu signal strength contour of any existing station would not be extended by new base stations, the Commission would accomplish several desirable objectives, including: (1) a dramatic reduction in the regulatory burden placed upon SMR licensees and the Commission when new SMR sites are proposed and constructed; (2) the facilitation of the creation of a seamless nationwide network of 800 Mhz advanced wireless communications providers, operated by both wide-area and local operators; (3) the ability of local SMR operators to offer higher quality services to the American consumer by utilizing high and/or low power transmitter sites within their protected service areas; and, finally, (4) the elimination of an antiquated site by site licensing scheme in favor of a "protected area" licensing scheme which will enable technology and advanced services to proliferate on all 280 Commercial 800 Mhz channels. In fact, the flexible placement of sites within a protected service area will permit local SMR operators to provide stiff competition to wide-area operators in certain niche markets which, of course, will serve to benefit the American consumer.

Critically, however, there is no justification or rational for restricting SMR licensees on the "lower 80 channels" from having the same site placement flexibility as those SMR licensees located on the upper 200 channels. Such an arbitrary distinction regarding site placement flexibility between the upper 200 and the lower 80 channels only serves to injure the public and will prevent advanced SMR services from evolving on the lower 80 channels thus, discriminating against those SMR companies, who, by random fate, are operating on the lower 80 channels. Though it may make sense to allocate the upper 200 channels for "wide-area" uses and the lower 80 channels for

"local area" uses, the Commission must strive to permit SMR operators on all 280 channels to place base stations anywhere within a defined protected service area in order to provide whatever services the American public demands. Let the market place dictate whether high power and/or low power base stations will provide the most useful services on all 280 SMR channels and the public interest will best be served.

Whether the Commission decides to auction SMR spectrum based upon MTA or BEA defined areas (for wide-area licensees), and/or BTA defined areas (for local licensees), all SMR licensees on all 280 channels should have the opportunity to place sites anywhere within their protected service areas, provided that the 40 dbu signal strength of their base stations does not extend beyond their protected areas.

IX. Wide-Area SMR Licenses Should Be Auctioned According To 174 BEA Areas And Special Consideration Should Be Given For Designated Entities

The PCS auction model could be improved upon by utilizing the 174 BEA (Bureau of Economic Analysis Economic Areas) defined areas for SMR auctions (i.e. the NTIA recommendation which came too late for use by PCS). The smaller BEA areas are designed around urban/suburban/rural commuting patterns and make better operational "auction bidding sense" than the MTA defined areas. The use of BEA defined areas in the SMR auctions would increase all forms of competition in the auctions, including designated entities, thus increasing auction revenues. Even if all four blocs of 50 SMR channels were not auctioned on a BEA basis, two blocs could be auctioned on a BEA basis and the other two could be auctioned on an MTA basis, thereby increasing the competitive mix of the SMR industry.

Like the PCS auction model, the Commission should create an entrepreneur's bloc (i.e. for BTA and BEA, and/or MTA, licenses) and special considerations for designated entities in order to ensure the inclusion of women, minorities and small businesses in the future of the SMR industry. Again, similar to the Commission's PCS model, and in order

to facilitate funding and ensure the SMR auction participation of women or minority controlled firms and small businesses, DCL strongly supports the following: (a) a 40% bidding credit for minority and/or women controlled firms; (b) the availability of tax certificates to non-controlling investors of minority and/or women controlled firms; (c) the PCS definition of minority and/or female controlled firms whereby women and/or minority principals own at least 25% of the equity and 50.1% of the voting stock; (d) reduced down payments and availability of installment payment plans should be offered to both small businesses and minority and/or female controlled firms who successfully bid in the SMR auctions; and, finally, (e) for SMR auction eligibility purposes, the Commission should adopt the SBA definition of small businesses in which a businesses' net worth is not in excess of \$6 million with average net income for the two preceeding years not in excess of \$2 million.

The SMR industry today is so dominated by one large company and its myriad affiliates that it desparately requires auction rules which will ensure the participation of small businesses, women and minorities. The adoption of the above proposal, items (a) through (e), should greatly encourage such participation.

X. The Lower 80 Channels Should Be Licensed For Local SMR Use With Flexible Site Placement Based Upon BTA Defined Areas

DCL urges the Commission to allocate the "lower 80" SMR channels to be licensed for local SMR use with flexible site placement based upon BTA defined areas. Critically, local/BTA licensees should be allotted three years to completely build out their licensed systems because any strict twelve month construction requirement imposed upon local/BTA licensees will prevent the development of advanced technologies on local/BTA licenses. The ability to utilize advanced technologies on all 280 SMR channels is critical to the development of the industry and, cannot be accomplished without flexible site placement and three year construction periods for local/BTA licensees. BTA licensing areas will permit substantially more operational flexibility than

the traditional 35 mile radius licensing areas and, combined with flexible site placement, will ensure the development of the most needed and useful services on the lower 80 channels. A one year delay between the auction of wide-area (BEA or MTA) and local/BTA licenses should permit sufficient time for voluntary migrations and changes of business plans for SMR operators who intend to bid on the local/BTA licenses.

XI. Migrations Or Relocations From Wide-Area Auction Blocs Must Be Entirely Voluntary

The FCC should not consider establishing a framework for what should be considered "reasonable" inducements to migrate from wide-area auction blocs nor should any formal entity place itself in an arbitrator's role in order to force migration. All migrations by SMR licensees, who did not purchase wide-area licenses via auction, must be entirely voluntary because third parties are not in a position to realistically determine what inducements are or are not "reasonable" and any efforts to mediate voluntary negotiations would be an administrative and legal nightmare. Further, many SMR licensees located on a "wide-area auction bloc" may themselves be in the process of implementing advanced SMR services on a wide-area scale. Why should one SMR business be forced to relocate when it has the same business plan or goal as an "auction winner" for whom it is relocating? Simply put, the litigation which would occur based upon any efforts to mediate or otherwise force migration or relocation could go on for decades. Well capitalized and well managed businesses will utilize the spectrum which best serves them and the public. Outside interferences or forces will only serve to injure businesses and the American consumer.

XII. Incumbent SMR Licensees Must Be Afforded Maximum Protection From Interference

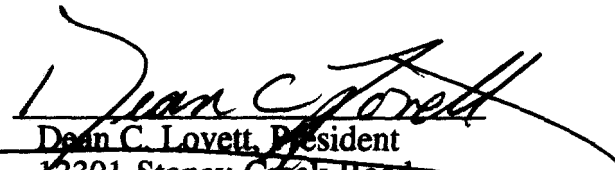
DCL strongly supports the Commission's tentative conclusion that wide-area SMR auction winners are required to afford protection to incumbent licensees as provided by 90.621(b), either by locating their stations at least 70 miles from the facilities

of any incumbent licensee, or by complying with the co-channel separation standards set forth in the Commission's "short-spacing" rule if it seeks to operate stations less than 70 miles from an incumbent licensee. Existing SMR licensees could have their businesses and livelihood literally "stolen out from under them" if the Commission does not protect their established service areas to the maximum extent possible. Once again, well managed businesses will make the most efficient use of SMR spectrum. While protecting the established rights of SMR licensees, the Commission is permitting free market forces to dictate how to best provide communications services to the public.

WHEREFORE, pursuant to the above, DCL Associates, Inc. strongly encourages the Commission to adopt its suggestions and comments in order to provide for a flexible regulatory scheme which will allow efficient licensing and enhance the competitive potential of the SMR industry.

Respectfully submitted,

DCL ASSOCIATES, INC.

By: 
Dean C. Lovett, President
12301 Stoney Creek Road
Potomac, MD 20854
(301) 926-9360

Of Counsel:

Raymond Kowalski, Esq.
Keller And Heckman
1001 G Street, NW, Ste 500 West
Washington, DC 20001
(202) 434-4230

Dated: January 5th, 1995